

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

JOSE CARRION, CHAPTER 13 AND 12,
TRUSTEE FOR PUERTO RICO AND THE U.S.
VIRGIN ISLANDS¹

Employer

and

UNION DE TRONQUISTAS DE PUERTO RICO,
LOCAL 901

Petitioner

Case 24-RC-8374

DECISION AND ORDER

Upon a Petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board, to determine whether a question concerning representation exists, and if so, to determine an appropriate unit for collective bargaining. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:²

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated and I find that the Employer is engaged in

¹The name of the Employer appears as amended at the hearing.

²The Employer filed a brief which has been carefully considered. No other briefs were filed.

commerce within the meaning of the Act.³

3. The parties stipulated and I find that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner claims to represent employees in the following units which total approximately 37 employees, which the parties have stipulated are appropriate. In this regard the parties agreed that the professional employees would be accorded the option to vote as to whether they wish to be separately represented or included in the unit of non-professionals.

Unit A

INCLUDED: All regular full-time and part-time employees, including clerks, technicians, data entry employees, office employees, and receptionists employed by the Employer at its San Juan, Puerto Rico facility.

EXCLUDED: All other employees, confidential employees, guards and supervisors as defined by the Act.

Unit B

INCLUDED: All regular full-time and part-time professional employees employed by the Employer at its San Juan, Puerto Rico facility.

EXCLUDED: All other employees, confidential employees, guards and supervisors as defined by the Act.

A. The Issue

The sole issue to be determined in this case is whether the Board has jurisdiction over the Employer. The Employer contends that the Board lacks jurisdiction over it because as a Chapter 12 and/or Chapter 13 Standing Trustee, it is not an employer within the meaning of the Act, but rather an administrative unit of the Federal government.

For the reasons set forth below, I find merit in the Employer's contention. The Board has held that the political subdivision exemption in Section 2(2) of the Act encompasses entities which are either created directly by the State, or administered by individuals who are responsible to public officials or to the general public, and I find that

³The record disclosed that in calendar year 2003, the Employer received revenues in excess of 2 million dollars. In addition it was shown that the Employer had more than a *de minimis* amount in interstate commerce.

the Employer herein is administered by an individual who is responsible to the United States Trustee, a public official.

B. Background

1. Overview of the United States Trustee System

The United States Trustee System, originally established in 1978 as a pilot program in only a few states, was permanently adopted in 1986.⁴ The system was created to lodge administrative responsibility for bankruptcy trustees outside of the judiciary. The U.S. Trustee System is a division of the Department of Justice and is comprised of three organizational units: 1) The Executive Office of the United States Trustees; 2) regional offices; and 3) field offices⁵. The Executive Office is responsible for setting policy, overseeing the substantive operations of the system, and handling administrative functions⁶. The 21 regional offices are each headed by a U.S. Trustee appointed by the U.S. Attorney General for a five-year term.

The U.S. Trustee is authorized to appoint standing trustees pursuant to Section 586 (b) of the Bankruptcy Code, which provides that:

"If the number of cases under Chapter 12 and/or 13 of title 11 commenced in a particular region so warrants, the United States Trustee for such region may, subject to the approval of the Attorney General, appoint one or more individuals to serve as standing trustee, or designate one or more assistant United States trustee to serve in cases under such chapter. The United States trustee for such region shall supervise any such individuals appointed as standing trustee in the performance of the duties of standing trustee."

2. The Standing Trustees

Chapter 12 and Chapter 13 standing trustees perform multiple duties critical to the administration of Chapter 12 and 13 cases. The standing trustee supervises the debtor and is heard on questions of property valuation, plan confirmation, plan modification and ensures that the debtor begins making timely payments. The Bankruptcy Code direct Chapter 12 and Chapter 13 standing trustees to make

⁴Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended at 28 U.S. C. ss 581-589a (1988)).

⁵There are 93 field offices headed mostly by Assistant U.S. trustees.

payments to creditors under the plan “except as otherwise provided in the plan or in the order confirming the plan”.⁷

The parameters for determining the standing trustee’s compensation are set forth in the Bankruptcy Code Section 586(e). The standing trustee’s compensation depends on the volume of disbursement that is generated from the funds received by the trustee, with a maximum cap,⁸ which is established and revised by the U.S. Trustee.⁹ The amounts levied on the plan payments are applied in three ways. 1) They are used to pay the trustee’s personal compensation; 2) pay the salaries of the trustee’s staff and other overhead expenses of the trustee’s office; 3) a portion of the fee goes towards the funding of the United States Trustee System Fund.

The standard of conduct for the standing trustees, including procedures for suspension¹⁰ and termination of the assignment for future cases is included in the Code of Federal Regulations.¹¹ A standing trustee’s inability to administer cases may result in his removal.¹²

C. The Facts

1. Overview of the Employer’s Operations

José Carrión is one of the designated Chapter 13 and Chapter 12 standing trustees for the Commonwealth of Puerto Rico and the U.S. Virgin Islands.¹³ Carrión was first appointed by the United States Trustee as a Chapter 13 standing trustee on October 1, 1998, and since then, his appointment has been reissued every year.¹⁴ In addition, he was appointed as a Chapter 12 standing trustee in mid 2002.

⁶A number of courts agree that the Executive Office of the U.S. Trustee is an administrative agency. See, for example, In Re Gigdeon, 158 BR 528, 530 (SDFla.1993), holding that when the US Trustee operates as an administrative arm of the bankruptcy court rather than as a party in interest, it is an administrative agency.

⁷Handbook, page 3-1.

⁸An amount not to exceed the highest annual rate of basic pay in effect for level V of the Executive Schedule.

⁹Every year an Order Fixing Fee and Compensation is signed by the person in charge of the United States Trustee Program.

¹⁰This may occur, for example, if a trustee demonstrates a failure to properly administer cases, or refuses to cooperate with the United States Trustee or to adhere to applicable policies.

¹¹28 C.F. R. Sections 58.4 and 58.6.

¹²11 U.S.C. Section 324 authorizes the United States trustee to file a motion for removal.

¹³The Commonwealth of Puerto Rico and the U.S. Virgin Islands are included in Region 21. Region 21 also includes Alabama, Florida, and Georgia.

¹⁴His appointment has been reissued every October for a twelve-month period ending on September 30, which is the end of the fiscal year for purposes of the operations involved.

Currently, the caseload assigned to Carrión to administer as Chapter 13 and Chapter 12 standing trustee is of approximately 13,000 cases. His office is located in San Juan, Puerto Rico. It is undisputed that Carrión is not an employee of the United States Government.

Carrión's compensation and his office operational expenses are paid from the revenues collected from debtors as disbursement fees in Chapter 12 and Chapter 13 plans. The percentage fee authorized for the year 2003 was 8%.¹⁵ During the year 2003, Carrión collected revenues in excess of 2 million dollars (\$2,000,000) as disbursement fees.¹⁶

2. The Standing Trustee's Employees

Carrión's office is staffed with approximately 37 employees. These employees are paid directly by Carrión's office with the funds collected as disbursements fees.¹⁷ Carrión's employees are hired directly by his office and are not federal employees. Although Carrión has discretion to recommend specific salaries for his employees, this discretion is to be exercised within the grading range established in a labor market study for a particular job.¹⁸ Carrión can also create a job position within his office structure, but it has to be submitted to the U.S. Trustee's Office for approval together with his annual budget. Thus, Carrión has to submit his office annual operational budget, which includes employees' compensation, and yearly salary increases, and employees' job descriptions to the U.S. Trustee, for evaluation and approval. In addition, Carrión's operations are audited once a year by an independent accounting firm selected by the U.S. Trustee.

¹⁵An Order fixing compensation and percentage fees is issued every year.

¹⁶According to the Annual Audit Report, during the year 2003, Carrión, as Chapter 13 standing trustee, collected \$2,522,685 in disbursement fees.

¹⁷In order to process its office payroll, Carrión maintains a contract with a private company identified as either ADP or EDT. The payroll information is gathered by this company electronically once a week. Employees' payroll information is verified internally by the office supervisors. The office payroll is not submitted to the U.S. Trustee or the Justice Department for approval.

¹⁸The U.S. Trustee requires each office in the Region to generate a labor market study or salary study. The purpose of the study is to evaluate each job description and based upon different factors, such as the complexity and type of performance, to establish a salary grading for each position. The study is conducted by an external consulting firm, which is contracted to perform the same study in each of the chapter 13 standing trustees offices included under Region 21.

In the operation of his office, Carrión has to follow the guidelines established by the Office of the United States Trustee Program of the Department of Justice, known as the Chapter 13, Standing Trustee Handbook.

While unclear from the record, it appears that the standing trustee's office as such does not pay State or Federal taxes, nor Municipal Real Estate Property Taxes, but Carrión does make Social Security payments for his employees.

D. Legal Analysis

Section 2(2) of the Act excludes from the definition of employer under the Act “the United States or any wholly owned Government corporation or any Federal Reserve Bank, or any state or political subdivision thereof.”

In order to determine whether entities are political subdivisions exempt from the Act, the Board uses a two-prong test established in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971). Under that test, political subdivisions are entities that are either (1) created directly by the State, so as to constitute departments or administrative arms of the Government, or 2) administered by individuals who are responsible to public officials or to the general electorate.

In Hawkins County, the Supreme Court found that a gas utility district was within the second prong of the Board's test, as it was administered by individuals who were responsible to public officials, in large part because the commissioners administering the district were appointed by an elected county judge and also were subject to removal under the state's General Ouster Law.

In its decision in University of Vermont, 297 NLRB 291 (1989), the Board found the employer to be exempt from the Board's jurisdiction as a political subdivision, even though the Board of Trustees was found to operate in an autonomous manner, with independent authority to establish personnel policies, wages, benefits and to enter into collective bargaining agreements and to ratify such agreements without the approval of the legislature. Applying the test in Hawkins County, the Board noted that because 12 of the 13 trustees were selected by the State, either by legislation or by gubernatorial appointment, the state clearly exercised control over the University Board of Directors. Id 295. In Research Foundation of the City of New York, 337 NLRB 965, 968 (2002), however, the Board did not find the employer to be exempt from jurisdiction because the

appointment and removal of the members of the Board of Directors was not governed by any statutory provision, but rather by the Employer's by-laws, which were enacted by its Board of Directors. The Board concluded that the 17 members of the Board of Trustees were not responsible to public officials or the general electorate. The Board, following Hawkins County, reiterated that in order to determine whether an entity is "administered" by individuals responsible to public officials or to the general electorate, the Board considers whether the individuals are appointed, and subject to removal, by public officials.

This requirement is consistently applied throughout the Board's decisions. In Cape Girardeau Care Center, Inc., 278 NLRB 1018, 1020 (1986), the Board did not exempt the employer from its jurisdiction. Of significance to the Board was the fact that the county neither had the authority to appoint the Board of Directors nor to remove any Board member. Rather the incumbent Board actually selected their successors subject to the county approval. The Board determined that there was no "direct personal accountability " to the county's public officials and any approval of the board members was simply ministerial. Also, in St. Paul Ramsey Medical Center, 291 NLRB 755 (1988), the Board found that the employer was not an administrative arm of the Government. In finding that the employer failed the second prong test of Hawkins County, the Board noted that there was no requirement that the employer's Board of Directors be government officials or "appointed" by government officials and there was no provision for the removal of its Board members by any government official. Accordingly, the Board concluded that the employer was not an exempt political subdivision as it was neither an administrative arm of the Government nor was it administered by individuals who were responsible to public officials.

In Oklahoma Zoological Trust, 325 NLRB 171 (1997), in reaching its conclusion that the employer was a political subdivision exempt from the Act, the Board noted that three of the nine trustees were public officials, and the remaining six trustees were selected by the mayor and confirmed by the city council. Removal of the trustees was regulated by statute, which provided that trustees were subject to removal from office by the district court having jurisdiction. Removal was for cause, including incompetence, neglect of duty, or malfeasance in office.

In the instant case, the Employer is administered by an individual who as standing trustee has been appointed pursuant to Section 586 (b) of the Bankruptcy Code by the U.S. Trustee, with the approval of the U.S. Attorney General. Although this section is silent as to the power of removal, it has been held that the power of removal of the U.S. Trustee is implicit in the power of appointment. Thus, in Barbara W. Richman, 48 F. 3d 1139 (1995), the Court of Appeals for the 10th Circuit dismissed a claim by a “removed “ standing trustee who alleged, among others, that Section 324 of the Bankruptcy Code¹⁹, denied the U.S. Trustee the power of removal and placed sole authority to remove in the hands of the District Court. The Court concluded that generally the power of removal is implicit in the power of appointment unless the appointment carries with it a definite term of office or a statutory constitutional provision limits the removal power.

In the instant case, the standing trustee not only is appointed by the U.S. Trustee with the approval of the U.S. Attorney General, and subject to removal at the instance of the U.S. Trustee at any time, and/or by a U.S. District Court for cause, but other factors which reflect the level of accountability of the standing trustee toward the U.S. Trustee, are present here: 1) the Employer’s finances are under strict supervision of the U.S. Trustee; 2) the Employer’s operational budget has to be submitted to the U. S. Trustee for approval; 3) the Employer’s books and accounts are audited every year by the U. S. Trustee; 4) a percent of the disbursement fees collected by the Employer goes to the support of the U.S. Trustee System; 5) in the operation of his office, the Employer has to follow the guidelines for Chapter 13 Standing Trustees; 6) the standing trustee enjoys limited immunity when acting within the scope of its duties.²⁰

Under these circumstances and based upon the record, I conclude that the Employer, as a standing Chapter 12 and Chapter 13 trustee, is a political subdivision

¹⁹11 U.S.C. section 324

²⁰ In re Castillo, C.A. 9, (2002), 297 F. 3d 940, the Court indicated that the Chapter 13 bankruptcy trustee is a creature of the Bankruptcy Code, which enumerates specific duties, rights and powers of the bankruptcy trustee. The Court concluded that the Chapter 13 trustee was entitled to absolute quasi –judicial immunity from liability for both scheduling and noticing the confirmation hearing; both tasks were essentially one function, the judicial function of managing the bankruptcy court’s docket in the resolution of disputes, and this function was unquestionably discretionary in nature. See also Bennett v. Williams, 892 F. 2d 822 (9th Cir. 1989), holding that bankruptcy trustees are entitled to broad immunity from suit when acting within the scope of their authority and pursuant to court order.

exempt for the coverage of the Act, rather than an employer within the meaning of section 2(2) of the Act.

ORDER

IT IS HEREBY ORDERED that the Petition filed herein be, and it hereby is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570. The Board in Washington must receive this request by **July 1, 2004**.

Dated at San Juan, Puerto Rico, this 17th day of June, 2004.



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